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IN THE

Supreme Court of the United States

OCTOBER TERM 1961

No. 396

C. J. D. RUDOLPH and IRMA M. RUDOLPH,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF OF AMERICAN HOTEL ASSOCIATION *AMICUS CURIAE*

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BRIEF OF AMERICAN HOTEL ASSOCIATION *AMICUS CURIAE*

The Interest of the *Amicus Curiae*

This brief is submitted on behalf of the American Hotel Association *amicus curiae* with the written consent of both the petitioners and the respondent.

The American Hotel Association is a membership trade association with offices at 221 West 57th Street, New York City and Wyatt Building, Washington, D. C. Its members are state hotel associations, most of which are located in the United States (every state being represented) as well as a comparatively few members in Canada, Mexico, Puerto Rico and other islands of

the West Indies. These state and territorial hotel associations presently have a membership of 5,553 hotels with a total of 647,221 rooms. The hotels range from very small establishments located in villages to large commercial hotels in cities. The membership also includes residential hotels and resort hotels.

The issues in the present proceeding are of direct and immediate interest to every hotel in the United States and its territories. The contentions of the petitioners are (a) that the amount expended by the principal of C. J. D. Rudolph, one of the taxpayers, to send such taxpayers to a company convention held at a New York City hotel was not income to the taxpayer and (b) that if said amount constituted income to the taxpayers, they are also entitled to treat the expenditure of said amount as an ordinary and necessary business expense for income tax purposes.

The hotel business is essentially one which furnishes service to individuals while they are away from home. The taxpayer Rudolph and his wife are typical of the individuals who patronize hotels while attending business meetings and conventions. The decision of the Court below in this proceeding against the taxpayers has had an immediate adverse effect upon this segment of this large and important industry. It is also of great importance to those related industries whose business benefits from the patronage of the business traveler and convention delegate, such as the retail stores, restaurants and the transportation industry.

The 1958 Census of Business, taken by the Bureau of Census of the United States Department of Commerce, lists 11,141 year-round hotels in the United

States as having 25 or more guest rooms. These hotels reported total annual receipts from customers of $2,363,083,000. These same establishments reported having 361,596 employees and annual payrolls of $851,807,000. 8,882 of these establishments, having a total of 947,281 guest rooms, gave a breakdown of annual receipts from customers which includes the following figures:

Guest room rentals	$1,130,052,000.
Meals and nonalcoholic beverages	$ 600,007,000.
Alcoholic beverages	$ 230,751,000.

3,974 seasonal hotels are also listed in the census having receipts of $241,034,000 and 22,818 employees. 3,126 of these establishments, having 164,910 rooms, reported annual payrolls of $64,639,000.

Every hotel, large or small, and year-round or seasonal, currently derives an increasing percentage of its business from business meetings and conventions. The increased speed and facility of travel in recent years and the complexity of modern business organizations have resulted in a tremendous growth in the number, importance and size of business meetings and conventions held in hotels in all parts of the country. There are valid business reasons for holding these meetings away from the home office of a company. In addition, the growth of trade associations, professional groups, labor unions and similar organizations has made the convention an integral and important part of American economic and cultural life. This changing pattern of business practice has, in turn, changed the pattern of the hotel patronage. The

hotel's economy is now based, to a substantial extent, upon the increasing use of hotel facilities for business meeting and convention purposes. The decision of the court below in the present proceeding raises a direct threat to this economy and the final decision can have immediate and widespread effects on the entire industry.

ARGUMENT

1. The Amount Paid for Transportation and Subsistence Did Not Constitute Gross Income to the Taxpayers.

In the present proceeding the taxpayers are being assessed Federal income tax on the estimated fair value of transportation and subsistence furnished to them by Southland Insurance Company. The taxpayer C. J. D. Rudolph is a life insurance agent for said Company and he and his wife attended a convention of agents held in New York City and paid for by the Company.

We urge that under the circumstances of this case the estimated value of the transportation and subsistence did not constitute gross income to the taxpayers. In the early case of *Eisner* v. *Macomber*, 252 U. S. 189, 207 (1920), it was made clear that to constitute income the taxpayer must have received "something of exchangeable value * * * for his separate use, benefit and disposal." Other statements of this general principle are found in numerous subsequent cases.

> "The Court is aware of no all-inclusive test of compensation as the term is used in the statute. It would seem that it must contemplate an economic benefit to the employee. Here, it can hardly be disputed that the furnishing of food and lodging to the taxpayer was not to his economic benefit.

Every benefit, however received by a taxpayer from his labor, is not taxable." [*Diamond* v. *Starr*, 116 F. Supp. 28, 31 (1953)].

"* * * The power to dispose of income is the equivalent of ownership of it and the exercise of the power to procure its payment to another is within the reach of the statute taxing income '"derived from any source whatever."' Harrison v. Schaffner, 312 U. S. 579, 580, 61 S. Ct. 759, 760, 85 L. Ed. 1055. To the same effect are Lucas v. Earl, 281 U. S. 111, 114, 50 S. Ct. 241, 74 L. Ed. 731; Galt v. Commissioner of Internal Revenue, 7 Cir., 216 F. 2d 41, 46 and 47, and Pleason v. Commissioner of Internal Revenue, 7 Cir., 226 F. 2d 732." [*Hulbert* v. *Commissioner*, 227 F. 2d 399, 401 (1955)].

"Petitioner received 'nothing of exchangeable value'; he received a credit upon the cost of a capital investment; he merely entered into a transaction whereby he procured decrease in his capital loss." [*Hirsch* v. *Commissioner*, 115 F. 2d 656, at page 658 (1940)].

Applying these principles to the facts surrounding the payment in the present proceeding makes it clear that the essential elements of control, choice and disposition by the taxpayers were completely absent. The facts appear to be undisputed. The taxpayer C. J. D. Rudolph was required to write $400,000 insurance during the year to be eligible to be invited on the trip; all arrangements were made by the Company; the taxpayers were required to go on the special train;

they were not consulted as to the arrangements or accommodations; the time for the trip and the complete program were set by the employer; the Company considered the entire trip part of its training program and agents who were invited were required to follow such program; the wife was expected to attend; and finally the taxpayers had no knowledge of the amount expended by the Company for transportation and subsistence. It would be difficult to find a more comprehensive set of facts to demonstrate the complete lack of control, a factor which must be present if the payment is to constitute income. In the language of the *Eisner* case, *supra*, it was certainly not of "exchangeable value" nor was it for the taxpayers' disposal. It is hard to find the "economic benefit to the employee" referred to in *Diamond* v. *Sturr*, *supra*, unless a training program can be held to constitute an indirect economic benefit to an employee or agent. The cases do not go that far.

It is well to keep in mind the admonition in *Bittendorf* v. *Commissioner*, 49 F. 2d 173, 176 (1931):

> "* * * The government will not resort to sharp practice, nor invoke technical construction or fiction, which will manifestly thwart the good-faith intention of its taxpayers, for the purpose of visiting a tax burden upon one who in fact did not, except by construction, derive any beneficial income from the transaction."

2. If the Value of the Transportation and Subsistence Provided to the Taxpayers Constitutes Gross Income, the Taxpayers are Entitled to Deduct the same Amount from Gross Income as a Travel Expense While Away from Home in the Pursuit of a Trade or Business under Section 162(a)(2) of the Internal Revenue Code.

Section 162 of the Internal Revenue Code provides, in part, as follows:

> "SEC. 162. TRADE OR BUSINESS EXPENSES.
>
> (a) In General.—There shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including—
>
> * * * * *
>
> (2) traveling expenses (including the entire amount expended for meals and lodging) while away from home in the pursuit of a trade or business;"

It is urged that in the present proceeding the expense was not only ordinary and necessary but was incurred in the carrying on of a trade or business. It has long been settled that to be deductible the expense must be both ordinary and necessary. *Helvering* v. *Highland*, 124 F. 2d 556, 562 (1942); *Commissioner* v. *The Hub*, 68 F. 2d 349 (1934); *Deputy* v. *Du Pont*, 308 U.S. 488 (1940). In some cases it has been held that an expense may be ordinary though it happened but once in a lifetime if the transaction were of common or frequent occurrence in the type of business. *Welch* v. *Helvering*, 290 U.S. 111 (1933). That question does not arise in the present proceeding because the taxpayers had, for many years, been attending similar conventions paid for by the Company.

As pointed out above, the business meeting or convention has become an established feature of American business life and the expense of attending one has long been recognized as ordinary. Reg. Sec. 1.162-2(d).

In *Commissioner* v. *Flowers*, 326 U.S. 465 (1946), the rule is set forth most fully as follows, at page 470:

> "Three conditions must thus be satisfied before a traveling expense deduction may be made under § 23(a)(1)(A)*:
>
> (1) The expense must be a reasonable and necessary traveling expense, as that term is generally understood. This includes such items as transportation fares and food and lodging expenses incurred while traveling.
>
> (2) The expense must be incurred 'while away from home.'
>
> (3) The expense must be incurred in pursuit of business. This means that there must be a direct connection between the expenditure and the carrying on of the trade or business of the taxpayer or of his employer. Moreover, such an expenditure must be necessary or appropriate to the development and pursuit of the business or trade."

In the same case, at page 474, the rule is further clarified:

> "Travel expenses in pursuit of business within the meaning of § 23(a)(1)(A) could arise only when the railroad's business forced the taxpayer to travel and to live temporarily at some place other than Mobile, thereby advancing the interests of the railroad. Business trips are to be identified in relation to business demands and the traveler's business headquarters. The exigencies of business rather than the personal conveniences and necessities of the traveler must be the motivating factors. Such is not the case here."

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* Now Sec. 162 of 1954 Int. Rev. Code.

See also *Ney* v. *U.S.*, 171 F. 2d 449 (1948) and *Berean* v. *Commissioner*, 165 F. 2d 521 (1948).

Applying these principles to the facts in the present proceeding, there can be no question as to the "direct connection between the expenditure and the carrying on of the trade or business of the taxpayer." It was a trip sponsored and paid for by the Company and, as pointed out above, undertaken by the taxpayer solely because of the "exigencies of business." The circumstances surrounding the trip and the absolute control over it exercised by the Company negative any finding that the motivating factor was the "personal convenience" of the taxpayers.

Regs. 1.162-2(b)(1) makes traveling expenses to and from a destination deductible "if the trip is related primarily to the taxpayer's trade or business." The circumstances surrounding the trip involved in this proceeding of the taxpayers' attendance at the convention make it clear that the trip did relate primarily (if not entirely) to the taxpayers' trade or business. The same regulation disallows such traveling expense if the trip is primarily personal in nature but permits an allocation of expense incurred at the destination. No such allocation of expense was permitted in the present case which implies that the entire trip was "primarily personal in nature," a conclusion which is completely contrary to any reasonable interpretation of the facts.

It is unnecessary to cite the numerous cases holding that expenses of attending a convention may constitute ordinary and necessary business expense deductible under Section 162. Regulation 1.162-2(d) specifically recognizes the deductibility of such expenses under cer-

tain circumstances. The regulation permits such deduction under proper circumstances even if attendance at the convention is voluntary, although in the present proceeding it is very clear that attendance was by no means voluntary. In the language of the regulation,

> "The allowance of deductions for such expenses will depend upon whether there is a sufficient relationship between the taxpayer's trade or business and his attendance at the convention or other meeting so that he is benefiting or advancing the interests of his trade or business by such attendance."

In the present proceeding the facts clearly demonstrate the relationship between the taxpayer's insurance agency business and the convention arranged and paid for by the Company and which for business reasons he was compelled to attend. It is also clear that he was "benefiting or advancing the interests of his trade or business by such attendance." His testimony as to the train trip in the exclusive company of other agents, both going to and coming from the convention, and his attendance at the business session makes it clear that he at least believed that he was benefiting or advancing the interests of his business by such attendance.

Disallowance of the entire expense in the present proceeding is in effect a finding that unless every waking hour of the participants traveling to and during a business convention is spent in the discussion of business matters, the purpose of the meeting and the trip thereto will be held to be personal and the entire expense disallowed.

The American Hotel Association does not believe that this is the law and that the fair and reasonable

interpretation of the tax laws intended by Congress does not justify such a result.

CONCLUSION

The judgment of the United States Court of Appeals for the Fifth Circuit entered June 17, 1961 should be reversed and the case remanded to the District Court for the entry of judgment in favor of the petitioners for the relief demanded in their first amended original complaint.

Respectfully submitted,

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